United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

71

BRIEF FOR APPELLANT AND APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

NO. 23622

CARMELIA CALLOWAY, [redacted].,

APPELLANTS

VS

CENTRAL CHARGE SERVICE, INC., and
FIDELITY ADJUSTERS, INC.,

APPELLEES.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

KING DAVID, ESQ.,
COUNSEL for APPELLANTS
1938 Eleventh St., N.W.
Washington, D.C. 20001

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

NO. 23622

Lee J. Calloway et

CARMELLA CALLOWAY, [redacted].,

APPELLANTS

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FIDELITY ADJUSTERS, INC.,

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I N D E X

TABLE OF CASES

OTHER REFERENCES

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

NO. 23, 622

Lee J. CALLOWAY et

CARMELLA CALLOWAY, [redacted].,

APPELLANTS

VS

CENTRAL CHARGE SERVICE, INC., and
FIDELITY ADJUSTERS, INC.

APPELLEES.

APPEAL FROM THE UNITED STATES
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ISSUES PRESENTED

In the opinion of the appellants the following issues are presented:

1. Whether the exaction of appellant's signatures for use as specimens, by the Metropolitan Police Department, in the absence of Counsel, violated appellant's rights protected under the fifth and sixth Amendments to the Federal Constitution?

2. Whether such illegally exacted evidence was admissible against appellants as the basis of expert opinion evidence?

3. Whether the trial Court erred in the admission of such testimony in evidence against appellants?

4. Whether the trial Court erred in denying appellants' Motion for a directed verdict against the counter-claimants, the appellees herein?

5. Whether there was any competent evidence for submission to the jury?

• This case has not previously been before this Court

REFERENCES TO RULING

The trial Court ruled that witness James T. Miller, was qualified as an expert in the field of handwriting and polygraphic material. (tr. 8 tr. 12 and 13.).

The denial of appellants' Motion For a Directed Verdict by the trial Court, (tr. 84.) and for Judgment Notwithstanding the Verdict. (tr. 153.).

STATEMENT OF THE CASE

(a) Summary of proceedings

The appellants instituted their suit, against the appellees in the Court below, charging conspiracy and defamation, and claiming damages therefor. That thereafter the appellees filed their counter-claim against the appellant in the sum of $1,387.75. At the conclusion of appellants' case, the trial Court directed a verdict for the appellees. Thereafter, the trial proceeded on appellees' counter-claim and at the conclusion of the evidence the jury found for the appellees on their counter-claim in the sum of $1,387.75.

Appellants' appeal herein is, therefore, prosecuted from the final judgment embodying the foregoing jury award.

(b) Evidence relevant to questions presented on appeal

Prior to the filing of the suit referred to above, the following transactions ensued between the appellants and officers of appellee, Central Charge Service, Inc.

Mrs. Carmella Calloway did not receive her monthly statements from Central Charge Service, Inc. for a period of six months, off and on. She constantly contacted the office to determine the reason for the failure to bill her. She was told several times that the bills were in the Billing Dept.,

and on one occasion she was told that the bills were being processed through a new type of processing. Eventually she received a card inquiring of her whether she had one or more charge plates bearing different numbers.

Appellant thereupon contacted Central Charge Service, Inc. in response to the foregoing inquiry, and she was told that her bill was over the limit and that in fact it was over $1,200.00. She told them that she knew that her account was not even near $1,200.00.

A short time thereafter, an employee of Central Charge Service, Inc. called appellants advising them that their account was over $1,900.00 and requested that they come to the office immediately to discuss the matter.

Thereupon appellants went to the office of Central Charge Service, Inc. and conferred with one of their officers, a Mr. Richard Morton.

During the aforesaid conference, a controversy developed between appellants and Central Charge Service, Inc., appellants contending that their account was far less than $1,200.00, while Central Charge Service, Inc. contended that appellants' account was in excess of $1,900.00.

Thereupon and during the process of said conference, a Mr. Williams from Central Charge Service, Inc. had requested appellant to sigh two separate forms, but she told them that

she was not signing anything and that she was not paying for anything that she did not buy. Whereupon Mr. Richard Morton said, "you sure will", these are official Police papers and you had better sign them.

At this point appellant stood up and said she was leaving. Mr. Williams asked her if she would go to the Police Department, she asked if she would be given legal advice there and he said "yes". Mr. Williams then turned to Mr. Morton and said that they could contact "Jimmy" and set up an appointment to come in that following Monday, (July 25, 1966). Mr. Morton left the room to place a telephone call to "Jimmy" and upon returning said, "Jimmy" would be waiting to see all of us on Monday, and that appellant would save a lot of time if she would sign the papers which were presented to her.

Appellant reiterated that she would sign no papers and that the only way she would go to the Police Department would be if they would assure her of receiving legal advice while there. Whereupon appellant left the conference room.

Thereafter on the following Monday, (July 25, 1966), appellant (wife) went to work and appellant (husband) was at home. An official from Central Charge Service, Inc. called and talked to appellant (husband), and stated that Messrs.

Morton and Williams were going to the Police Department and that appellant (wife) should meet them there. He called his wife and advised her of the telephone conversation and she said she would go. Thereupon appellant (wife) telephoned Central Charge Service, Inc. and talked to Mr. Williams and asked him if she would be given legal advice if she went to the Police Department. He said that he had been assured that she would be given legal advice. Appellant then told Mr. Williams that she would leave her office and be at the Police Department within thirty (30) minutes.

That upon appellant's arrival at the Police Department Mr. Williams was not there but Mr. Morton was and he took her up stairs to what she believed to be the Vice Squad.

Entering this office Mr. Morton asked for "Jimmy" and was told that "Jimmy" was not in that day.

Appellant and Mr. Morton then went to the office of Sgt. Magruder of the "Check and Fraud Squad", who took out some forms and told appellant that she would have to have them filled out and notarized. Appellant then informed Sgt. Magruder that she was assured by Messrs. Morton and Williams of Central Charge Service, Inc. that if she came to the Police Department she would be given legal advice. Sgt. Magruder replied: "that he did not have the time to go in to that". "That he had an assignment for which he was already late and reiterated that appellant would have to fill out the

forms and have them notarized. Appellant completed the forms, and had them notarized and thereafter returned same to the office of Sgt. Magruder.

That in addition to the foregoing and without the assistance of Counsel, on July 26, 1966, Sgt. Magruder took appellant to the office of James T. Miller, Chief of the Questioned Documents Section, Police Department, where appellant was required to sign two additional sheets for handwriting specimens purposes, containing appellant's name and address. (tr. 10 and 11.)

That as a result of the foregoing proceedings a genuine dispute arose between appellant and Central Charge Service, Inc. as the true and actual account of the appellant.

In order to pay balance due on said account, appellants issued their check to the order of Central Charge Service, Inc. on November 1, 1966, in the amount of $490.25, with the notation thereon: "in final payment in full", for the amount appellants owed. The Central Charge Service, Inc. accepted and cashed the said check with full knowledge of the notation appearing on said check.

The appellees made no attempt to sue the appellants after the acceptance and cashing of the said check on November 1, 1966. In 1967, the appellants sued the appellees for conspiracy and defamation, whereupon the appellees then counter-claimed for the said $1,387.75.

In order to maintain the allegations of the counter-claim the appellees called as their first witness James T. Miller, who having been first duly sworn, testified substantially as follows, in sofar as such testimony bears on the relevancy of the issues presented on this appeal:

"That he is Chief in Charge of the Questioned Documents Section for the Police Department".

The witness was thereafter asked and answered as follows:

Q. Would you tell us when you did examine those and at whose request, Mr. Miller.

A. I examined these sheets on July 26, 1966, I had them in my possession between that date, 7/26/66 and 7/29/66 when I examined them and wrote a written report regarding my findings in this case.

Q. And those are what sir, briefly.

A. Those are all sales slips, charge sales slips, from various merchants, bearing two different charge-a-plate impressions, and one is 202403036, Mrs. Lee J. Calloway and the other Group R or some of the other slips have charge-a-plate number 202453536, Mr. & Mrs. Lee J. Calloway and all of these slips are assigned Mrs. Lee J. Calloway.

Q. Did you have an opportunity yourself to take samples of the handwritting of Mrs. Lee J. Calloway.

A. Yes Sir, I did.

Q. And when these were given to you were you also given this sample handwriting.

A. Part of it -- I believe the part that is marked No. 7 was given to me as admittedly none writing specimens of Mrs. Lee J. Calloway.

Q. Admittedly

A. Yes, those were sales slips which she admitted signing.

Q. May I ask you Mr. Miller, why if she admitted signing these you took further handwriting samples.

A. Well at the time she came to my office this was on July 26, 1966, she was with Det. Sgt. Magruder.

Q. Is that now Lt. Magruder.

A. Yes, who was at that time Det. Sgt. Magruder now Lt. Magruder and he had Mrs. Calloway with him and he had two sample sales slip groups. There were 24 slips in plaintiff's exhibit No. 6 which were denied. The customer's signature on these were denied, and of which 7 slips marked in plaintiff's exhibit No. 7 were admitted signatures of Mrs. Calloway and he also had a handwriting specimen on a card which he had which bears the notation "date July 25, 1966 3:00 p.m. Check Squad", Mrs. Morris and L.H. Magruder as witnesses. This is known handwriting which she had given.

I looked at those and said to him that the handwritting which apoeared on that specimen card was not exactly like the signatures that appeared on the admitted sales slips and that there was some conflict and I felt we should have further specimens of Mrs. Calloway, and she gave two additional slips of handwritting specimens or wrote two additional sheets and they contain her name and address for me, in my presence at that time. That was July 25, 1966.

Q. Did you make any examinations of the questioned document that is the 202403036 card that Mrs. Calloway denied was her signature.

A. Yes as against the group of 24 slips which she denied 23 of them were signed and one was unsigned and I compared them with the 7 admitted slips and with the handwritting specimen card which she had given with the two additional sheets of handwritting which she had given to me and determined that -- (tr. 9-11.)

The witness was then asked: "Now as a result of your analysis, Mr. Miller, did you come to any conclusion as to the questioned or denied set of sales slips?" To which the witness said "yes".

The witness was next asked: "and what was that conclusion, sir"?

To which the witness answered:

A. Well the examination took the following form: First I compared the known specimens that she had given which was the specimen card and the known specimen which I had taken and determined that the first specimen card which had been given to Lt. Magruder was disguised. It was not her normal written signature. This is why I called for additional material because I had these admitted signatures which were in conflict. So I compared the known specimens that I had taken and the affidavit of forgery which I didn't know if they were in evidence or not — (tr. 12-13.)

At the conclusion of appellees' case appellants moved for a directed verdict, which said Motion was denied by the trial Court. (tr. 84.)

The foregoing Motion was premised on the issue of extinguishment of the debt, where the appellee, Central Charge Service, Inc. cashed appellants' check with the notation therein on "final payment, in full".

The case was thereupon submitted to the jury and the jury returned a verdict in favor of appellees in the amount of $1,387.75.

Whereupon appellants moved the Court for a Judgment Notwithstanding the Verdict, which said Motion was denied by the trial Court.

Appellants, therefore, prosecute this appeal from the judgment of the Court below entered on the jury verdict, aforesaid.

ARGUMENT

I

Compelling the appellant to sign her name for specimen purposes, by the Metropolitan Police Department without the advice of Counsel, was a violation of the fifth and sixth amendments.

The Record is replete with evidence demonstrating that appellant would be assured legal advice upon her appearance before the Police Department. Likewise the Record shows that appellant was not accorded the advice of Counsel during her appearance before the Police Department.

Indeed the testimony of James T. Miller, Chief in Charge of Question Documents Section of the Police Department clearly shows that the admitted handwriting of the appellant as submitted to him for analysis was in conflict with much of the writings and signatures that appeared on the slips and that he proceeded to obtain from the appellant her signature and address on two additional sheets. (tr. 11.)

In this respect, Chief Miller, testified as follows: "Detective Sergeant Magruder, now Lieutenant Magruder, and he had Mrs. Calloway with him and two sample sales slip groups. There were twenty-four slips in plaintiff's exhibit No. 6 which were denied. The customer's signatures on these

were denied and of which seven slips marked in plaintiff's exhibit No. 7 were admitted signatures of Mrs. Calloway and he had a handwriting specimen card which bears the notation "date July 25, 1966, 3:00 p.m. Check Squad, Mrs. Morris and L.H. Magruder", as witnesses. This is known handwriting which she had given. I looked at these and said to him that the handwriting which appeared on that specimen card was not exactly like the signatures that appeared on the admitted slips and that there were come conflicts and I felt that we should have further specimens of Mrs. Calloway and she gave two additional sheets of handwriting specimens --- and they contained her name and address --- for me in my presence at that time. That was July 25, 1966". (tr. 10-11.)

Chief Miller further testified that: "Well, the examination took the following form: First I compared the known specimens, that she had given, which were the specimen card and the known specimens, which I had taken, and determined that the first specimen card which had been given to Lt. Magruder was disguised. It was not her normal written signature. This is why I called for additional material, because I had these admitted signatures which were in conflict. So I compared the known specimens which I had taken and the affidavits of forgery. --". (tr. 12-13.)

Thus it is manifest from the foregoing testimony of Chief Miller that the specimens of Mrs. Calloway's signature which he had taken, constituted the nexus of his opinion. The proceedings to which the appellant was subjected was pretrial criminal examination. As early as "Powell vs Alabama", 287 U.S. 45, (1932), the Supreme Court recognized that the pretrial examination of a defendant was "perhaps the most critical period of the proceedings --", at and during which the accused "requires the guiding hand of Counsel".

In "White vs Maryland", 373 U.S. 59, 60, (1963), the Court said, among other things, that "only the presence of Counsel could have enabled this accused to know all the defenses available to him and to plead intelligently".

In "Escobedo vs Illinois," 378 U.S. 478, the Court held that the right to Counsel was guaranteed at the point where the accused, prior to arraignments, was subjected to secret interrogation despite repeated requests to see his lawyer. We again noted the necessity of counsel's presence if the accused was to have a fair opportunity to present a defense at the trial itself.

In "Miranda vs Arizona", 384 U.S. 436, 461, (1966), Chief Justice Warren, speaking for the Court said, among other things, that: "We are satisfied that all the principles embodied in the privilege apply to informal compulsion exerted by law-enforcement officers during in-custody questioning. An individual swept from familiar surroundings into Police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described cannot be otherwise than under compulsion to speak. As a practical matter, the compulsion to speak in the isolated setting of the Police Station may well be greater than in Courts or other official investigations, where they are often impartial observers to guard against intimidation or trickery".

The Court further stated that: "To day, then, there can be no doubt that the fifth amendment privilege is available outside of criminal Court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves. We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individuals will to resist and to compell him to speak where he would not otherwise do so freely. In order to combat these

pressures and to permit as full an opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored".

In "United States vs Wade", 388 U.S. 218, 226 (1967), the Court said: "It is central to that principle that in addition to Counsel's presence at trial, the accused is guaranteed that he need not stand alone against the state at any stage of the prosecution, formal or informal, in Court or out, where Counsel's absence might derogate from the accused's right to a fair trial". Accord: "Hannah vs Larche", 363 U.S. 420 (1960).

This Court has held such evidence obtained illegally to be inadmissible at trial against the defendant. Such was the holding of this Court in the case of "Bynum vs United States", 104 U.S. App. D.C. 368, 262 F.2d 465 (1958), "if the securing of one's finger-prints is illegally inadmissible, then the securing of one's hand-writing is equally illegally inadmissible".

II

Appellants combine herein for argument issues presented No. 2 and No. 3, as follows:

The trial Court erred in permitting the use of illegally obtained signatures of appellant in evidence, as the basis of expert opinion.

The question whether the proceedings utilized herein on July 25th and 26th, 1966 were intended for criminal prosecution, or whether the police Department used its offices and facilities in furtherance of private litigation, is of no moment. Suffice it to say that appellant was the victim of these processes and thereby denied her right guaranteed under the fifth and sixth amendments to the Federal Constitution.

Mr. Justice Holmes, speaking for the Court in the case of "Silver-Thorne Lumber Co. vs United States", 251 U.S. 385 (1920), and discussing the status of evidence obtained in violation of constitutional guarantees, said: "It reduces the fourth amendment to a form of words. —— The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all".

In the case of "McGarthy vs Arndstein", 266 U.S. 34, 40 (1923), Mr. Justice Brandeis, in delivering the opinion of the Court, said: "The Government insists, broadly, that the constitutional privilege against self-incrimination does not apply in any civil proceeding. The contrary must be accepted as settled. The privilege is not ordinarily dependent upon the nature of the proceeding in which the testimony is sought or is to be used. <u>It applies alike to civil and criminal proceedings, wherever the answer might</u>

tend to subject to criminal responsibility him who gives it. The privilege protects a mere witness as fully as it does one who is also a party defendant." (Emphasis supplied.)

Professor Wigmore in his treatise on evidence writes at length on the "form of disclosure protected", and states among other things, that: "in the interpretation of the principle, nothing turns upon the variations of wording in the constitutional clauses, this much is conceded (ante §2252). It is, therefore, immaterial that the witness is protected by one constitution from 'testifying', or by another from 'furnishing evidence', or by another from 'giving evidence' or by still another from 'being a witness'. These various phrasings have a common conception, in respect to the form of protected disclosure. What is that conception?

"Looking back at the history of the privilege (ante, §2250 and the spirit of the struggle by which its establishment came about, the object of the protection seems plain. It is the employment of legal process to extract from the person's own lips as admission of his guilt, which will thus take the place of other evidence. Such was the process of the ecclesiastical Court, as opposed through two centuries, - The inquisitorial method of putting the accused upon his oath, in order to supply the lack of the required two witnesses.

"The general principle, therefore, in regard to the form of the protected disclosure, may be said to be this: The

privilege protects a person from any disclosure sought by legal process against him as a witness". VIII Wigmore on evidence, Third Edition, Section 2263.

The above authorities unquestionably support the contention of the appellants that it was reversible for the trial Court to have admitted in evidence the specimens signatures of appellant, Carmella Calloway.

III

Issues presented numbers 4 and 5 are consolidated herein for argument.

<u>There was no competent evidence for submission to the Jury, and the trial Court erred in denying appellants' Motions for directed verdict and for judgment notwithstanding the verdict</u>

The law is well settled to the effect that where a claim is unliquidated or honestly in dispute, the payment and acceptance of a sum less than that claimed operates as an accord and satisfaction.

The Record in the case at bar discloses beyond question that the amount in controversy was unliquidated, that there was an honest dispute between the parties, that the appellants sent their check to Central Charge Service, Inc. on November 1, 1966, in the sum of $490.25 with the notation thereon, "final payment, in full," that the appellee accepted and cashed the said check with full knowledge of the notation thereon.

The restatement of Law, Contracts, Sec. 72, states that: "(1) where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases and no others:

"(a) where the offeree with reasonable opportunity to reject offered services takes the benefit of them under circumstances which would indicate to a reasonable man that they were offered with the expectation of compensation.

"(2) where the offeree exercises dominion over things which are offered to him, such exercise of dominion in the absence of other circumstances showing a contrary intention is an acceptance."

In the case of "Autographic Register Co. vs Philip Hano Co.," 1 Cir., 198 F.2d 208, 212 (1952), the Court stated that "furthermore, silent acceptance of a check sent in payment of a disputed claim, even in the absence of a finding of mental assent, is now generally held by parity of reasoning to constitute an accord and satisfaction of the claim."

In the case of "Decker vs George W. Smith Co.," 88 N.J.L. 630, 964, 915 (1916), the Court stated that: "Where, however, a claim is disputed or unliquidated, and the tender of a check in settlement thereof is of such a character as to give the creditor notice that it must be accepted in full satisfaction of the claim or not at all, the retention and use

thereof by the creditor constitutes an accord and satisfaction".

In the case of "Edgar vs Fitch", 46 Cal. 2d 309, 294 P. 2d 3 (1956), the Court said: "In this State it is established that where there is a bona fide dispute as to a claim and a check is tendered insettlement thereof which gives the creditor notice that it must be accepted infull discharge of the claim or not at all, retention and cashing of the check constitute an accord and satisfaction. It is immaterial that the creditor protests against accepting the check in full payment, for the law permits him only to reject completely or to accept inaccordance with the condition".

In the case of "Schuttinger vs Woodruff", 259 N.Y. 212, 216, 181 N.E. 361, 362 (1932), the New York Court of Appeals held that: "The tender of a sum, less than the one representing a claim asserted, but in good faith disputed, as a complete discharge of all indebtedness and its acceptance by the creditor under such conditions, create premises from which the conclusion must follow that the creditor acquiesces in the amount offered. Such a tender and acceptance satisfies the doctrine of accord and satisfaction".

Over sixty years ago, this Court held in the case of "Andrew vs Haller Wall Paper Co.", 32 App. D.C. 392, 395 (1908), Mr. Justice Robb stated that: "the rule is equally well established that, where a claim is unliquidated, or honestly in dispute, the payment and acceptance of a less sum than claimed operates as an accord and satisfaction, the compromise

being a good consideration for theconcession made". The learned Justice further observed that: "To constitute an accord and satisfaction, said Judge Pierpoint in Preston vs Grant, 34 Vt. 203, it is necessary that the money should be offered in satisfaction of the claim, and the offer accompanied with such acts and declarations as amounts to a condition that, if the money is accepted, it is accepted in satisfaction, and such that the party to whom it is offered is bound to understand therefrom that, if he takes it, he takes subject to such condition".

In the case of "Swanson vs United Greenfield Corp." (D.C. Conn, 1965), 239 F. Supp. 299, Chief Judge Timbers held that the defense of accord and satisfaction was established as a matter of law and that the defendant was entitled to summary judgment. Accord: Ferro Concrete Construction Co. (D.C. Ky. 1962), 205F.Supp. 625.

This Court is vested with the power to reverse a Jury verdict where such verdict is not supported by substantial evidence. Thus in the case of "Neely vs Eby Construction Co." 386 U.S. 317, 325, 326 (1967), Mr. Justice White said, among other things, "But these considerations do not justify an ironclad rule that the Court of Appeals should never order dismissal or judgment for defendant when plaintiff's verdict has been set aside on appeal. Such a rule would not serve the purpose of Rule 50 to speed litigation and to avoid unnecessary retrials".

In "Capital Transit Co. Inc. vs Gamble, et al., "82 U.S. App. D.C. 57, 160 F.2d 283, this Court said: "While we are of the opinion that defendant's Motion made at the close of plaintiff's evidence should have been granted, defendant's introduction of evidence was a waiver of that Motion and the Court's failure to grant it cannot be alleged as error on appeal. -- However, defendants' evidence in no way strengthened plaintiff's case and plaintiffs are in no better position as a result of it than they were at the termination of their own presentation. --

-- "We are of the opinion that the evidence adduced by plaintiffs, considered with all the inferences which justifiably can be drawn from it in their favor, is not sufficient to properly support a verdict for them."

So it is with the case at bar and giving the appellees the benefits of the inferences to be drawn from the evidence, the evidence is insufficient to support a verdict for them.

The appellants allege that the Court failed to properly instruct the Jury; the Jury did not understand what it was about. After the Jury's verdict had been announced, the female plaintiff, lowering her head to the Counsel table, commenced to sob very audibly. A female Juror in the front row was heard to exclaim "what's she crying about we fined Central Charge".

CONCLUSION

Wherefore, and by reason of the foregoing, appellants strenously urge this Court to reverse the judgment entered in the Court below.

Respectfully submitted,

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CO 5-4410

INDEX TO APPENDIX

CIV. DOCKET

United States District Court for the District of Columbia

PARTIES	ATTORNEYS	NUMBER
	King David	317-67
	1938 11th St. N. W.	
LEE J. CALLOWAY		ACTION FOR
CARMELLA C. CALLOWAY, his wife		CONSPIRACY & DEFAMATION
		#1. $50,000.00 #2. 50,000.00
VS.		TAXED COSTS
		Atty.
		Marshal
1. CENTRAL CHARGE SERVICE, A Corporation	Pledger & Mahoney	Clerk
	Daniel M. Head	Witnesses
2. FIDELITY ADJUSTERS, INC., A Corporation	925 Washington Bldg.	Depositions
	Robert W. Price	Examiner
	1028 Conn. Ave., N.W.	Ct. Appls.
	Jury demand ☒	TOTAL
	Report Judgt. ☐	

DATE		ACCOUNT	REC'D		DISB'D		DATE		ACCOUNT	REC'D		DISB'D	
1967													
Feb.	9	David	10	00									
Feb.	9	U. S. Treasury			10	00							
1969													
Sep	30	David	5	00									
Sep	30	U. S. Treasury			5	00							

CASE CLOSED

CIVIL DOCKET

United States District Court for the District of Columbia

DATE		PROCEEDINGS	Fee
1967		Deposit for cost by	
Feb.	9	Complaint, appearance filed	
Feb.	9	Summons, copies (2) and copies (2) of Complaint issued Both ser. 2-14.	
Mar.	21	Answer of deft #1 to complaint; c/m 3-20-67; appearance of Pledger and Mahoney, Daniel M. Head. filed	
Mar.	21	Motion of defts for more definite statement; c/m 3-13; M.C. filed	
Apr.	4	Order denying motion of deft #1 for more definite statement. (N)McGuire,J.	
Apr.	14	Answer of deft. #2 to complaint; c/m 4-14; counterclaim: appearance of Robert M. Price. filed	
Jun.	19	Notice of deft #1 to take deposition of Carmella C. Calloway; c/m 6-12. filed	
Jun	21	Answer of plaintiffs to counterclaim; c/m 6-21-67. filed	
Jun	21	Calendared (N) AC/N	
Oct	31	Called. Pretrial Examiner	
Nov	9	Notice of deft for resumption of deposition of pltf #2; c/m 11-8-67. filed	
-			
1968			
Feb	21	Deposition of Carmella C. Calloway, 2 Vols., 1-30-67 & 12-11-67, for deft. filed	
Apr	1	First notice under Rule 13.	
Apr	8	Certificate of readiness of pltf; c/m 4-8. filed	
Apr			
Mar	27	Pretrial proceedings; deft. #2 may take depositions of Drs. Rufus Browning and Purvis Williams. Pretrial Examiner	
Feb	5	Notice by deft. of taking deposition of pltf; c/m 1-22. filed	
Feb	27	List of witnesses for deft. #1; c/m 2-24. filed	
Mar	3	Depositions of Dr. Rufus C. Browning and Purvis Williams by deft. (fee $30.00) filed	
Mar	6	List of witnesses for deft. #2; c/m 3-3. filed	
Mar	11	List of witnesses by pltfs; c/m 3-7. filed	
May	26	Motion of pltfs. for leave to submit interrogatories; c/railing; exhibit. Denied. (N) Weddy, J.	
May	26	Opposition of deft. #1 to pltfs' motion to submit interrogatories;	

CIVIL DOCKET

United States District Court for the District of Columbia

CALLOWAY vs. CENTRAL CHARGE SERVICE C. A. No. 317-67 Supplemental Page 3.

DATE		PROCEEDINGS
1969		
Sep	15	Trial resumed; same jury and alternates; juror # 7 excused by Court; alternate juror # 1 takes seat # 7: respited to Sept. 16, 1969; (Rep: Joan Blair) Waddy, J.
Sep	16	Trial resumed; same jury and one alternate; respited to Sept. 17, 1969; (Rep: Joan Blair) Waddy, J.
Sep	17	Trial resumed; same jury and alternate juror; oral motions of defts. for a directed verdict as to the complaint argued and granted; oral motion of deft. # 2 to dismiss counterclaim granted; oral motion of deft. # 1 to amend by asserting counterclaim against the plaintiffs granted; respited to Sept. 18, 1969. (Rep: Joan Blair) Waddy, J.
Sep	18	Trial resumed; same jury and alternate; alternate juror discharged; verdict for Central Charge Service, Counter-Pltf. vs. Lee J. Calloway, Counter-Defts. in the sum of $1,387.75. (Rep: Joan Blair) Waddy, J.
Sep	18	Verdict and judgment for the defendants vs. the plaintiffs, on the complaint, by direction of the Court. (N) Waddy,J.
Sep	18	Verdict and judgment for Central Charge Service, Counter-Pltf. vs. Lee J. Calloway and Carmella C. Calloway, his wife, counter-defts. in the sum of $1,387.75 (N) Waddy,J.
Sep	18	Memorandum of deft. # 1 in support of motion for directed verdict filed.
Sep	18	Prayers # 1 - # 4 of counter-pltfs. filed.
Sep	18	Prayers of counter-defts.; c/m 9-18-69 . filed.
Sep	18	Note from jury. filed.
Sep	30	Notice of appeal by pltf. per order of 9-17&18-69; copies mailed to Robert Price and John F. Mahoney, Jr.; deposit $5.00 by David. filed

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CALLOWAY, et. al.	:	
Plaintiffs	:	
vs.	:	Civil Action No. 317-67
CENTRAL CHARGE SERVICE, et.al.	:	
Defendants	:	

COUNTER CLAIM

The defendant Fidelity Adjusters, Inc. hereby files the following counter claim against the plaintiffs pursuant to the rules of this Court:

1. The defendant Fidelity Adjusters, Inc. is the assignee of Central Charge Service, Inc.

2. The plaintiffs herein have a balance of one thousand three hundred eighty-three dollars and seventy-five cents ($1,383.75) together with interest from date of last payment, to wit, November, 1966, due and owing for merchandise sold and delivered on credit extended by assignor herein.

Wherefore, defendant Fidelity Adjusters, Inc., as assignee of Central Charge Services, prays for judgment against the plaintiffs, jointly and severally, in the amount of $1,383.75, plus interest from November, 1966, and Court costs.

Robert M. Price
Attorney for Defendants
1028 Connecticut Avenue, N.W.
Washington, D.C.
Tele: 296-7770

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Counter Claim was mailed, postage prepaid, this 4th day of April, 196[illegible], to: King David, Esq., at 1938 11th Street, N.W., Washington, D.C.

Robert M. Price

LAW OFFICES
ROBERT M. PRICE
1028 CONNECTICUT AVE.
WASHINGTON, D. C. 20036

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

LEE J. CALLOWAY and CARMELLA C. CALLOWAY	*	
PLAINTIFFS	*	
vs.	*	CIVIL ACTION NO. 317-'67
CENTRAL CHARGE SERVICE and FIDELITY ADJUSTERS, INC.	*	
DEFENDANTS	*	

PLAINTIFFS' ANSWER TO COUNTERCLAIM

Come now the plaintiffs, Lee J. Calloway and Carmella C. Calloway, by and through their Attorney, King David, and as for their answer to defendant, Fidelity Adjusters, Inc. counter-claim states as follows:

1. Defendant's counter-claim fails to state a claim upon which relief can be granted.

2. Plaintiffs deny each and every material allegation of defendants' counter-claim.

Wherefore, plaintiffs pray that defendant's counter-claim be dismissed without costs and that they be granted judgment against the defendant as prayed for in their original complaint.

/s/
KING DAVID
1938 Eleventh Street, N. W.
Washington, D. C.
Columbia 5-4410
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing answer to counterclaim was mailed, postage prepaid, to Robert M. Price, Esquire, 1028 Connecticut Avenue, N. W., Washington, D. C., Attorney for defendant Fidelity Adjusters, Inc., and John F. Mahoney, Jr., Esquire, 925 Washington Building, Washington, D. C., Attorney for defendant Central Charge Service, this 21st day of June, 1967.

/s/
KING DAVID

KING DAVID
COUNSELLOR-AT-LAW
1938 ELEVENTH ST. N. W
WASHINGTON 1, D. C.

MR. DAVID: Yes, sir.

THE WITNESS: In the sense that two and two is four, no sir.

MR. DAVID:And you say that there is no degree conferred by any school in this"forensic- science"?

THE WITNESS: No, no,sir— not in the field of forensic science -- I said that there is no school that gives a degree as a doctor, questioned document analysis.

MR. DAVID: I have nothing further.

THE COURT: The court rules that he has qualified as an expert in the field and he may so testify.

MR. PRICE: Thank you, sir.

BY MR. PRICE:

Q Now Mr. Miller, I show you two exhibits in this case, plaintiffs exhibits 6 and plaintiff's exhibit 7 -- have you had occasion to see those prior to today, sir?

A In the interests of time I am going to check about the firstfive pages in each stack -- and the first five in the stack which has been marked plaintiff;s exhibit No. 6
I have recorded in my records as having examined these as part of a group of 24. I assume that this is the same group of twenty four, and the first six correspond with the entries which I have in my records.

Q I see.

MR. DAVID: I object to any assumption on the part of

the witness.

THE COURT: The objection is overruled.

BY MR. PRICE:

Q Continue please, Mr. Miller.

A The second group marked plaintiff's exhibit 7, again I am examining those and in the screening of the first four or five that I come to, I have photocopies of these and I had them in my possession at the time the photocopies were made.

Q Would you tell us when you did examine those and at whose request, Mr. Miller?

A I examined these sheets on July 26 1966 - I had them in my possession between that date, 7.26.66 and 7.29.66, when I examined them and wrote a written report regarding my findings in this case.

Q And those are what, sir, briefly?

A They are all sales slips, charge sales slips, from various merchants, bearing two different chargaplate impressions, and one is 202403036, Mrs. Lee J. Calloway and the other group are or some of the other slips have chargaplate Number 202453536, Mr. and Mrs. Lee J. Calloway and all of the slips are signed "Mrs. Lee J. Calloway".

Q Did you have an opportunity yourself to take samples of the handwriting of Mrs.Lee J. Calloway?

A Yes, sir - I did.

Q And when these were given to you, were you also given this sample handwriting?

A Part of it -- I believe the part that is marked No.7 was given to me as admittedly known writing specimensof Mrs. Lee J. Calloway.

Q Admittedly?

A Yes -- these were sales slips which she admitted signing.

Q May I ask Mr. Miller, why if she admitted signing these you took further handwriting samples?

A Well at the time she came to my office - this was on July 26 -- she was with Detective Sergeant Magruder.

Q Is that now Lieutenant Magruder?

A Yes - who was at that time Detective Sergeant Magruder, now Lieutenant Magruder, and he had Mrs. Calloway with him and he had two sample sales slips groups. There were twenty four slips in plaintiff's exhibit No. 6 which were denied. The customer's signature on these were denied and of which seven slips marked in plaintiff's exhibit No. 7 were admitted signatures of Mrs. Calloway and he had also a handwriting specimen card which he had, which bears the notation "Date July 25, 1966 3 pm, check squad, Mrs. Morris and L. H. Magruder"aswitnesses. This is known handwriting which she had given.

I looked at those and said to him that the handwriting

which appeared on that specimen card was not exactly like the signatures that appeared on the admitted slips and that there was some conflict and I felt that we should have further speciments of Mrs. Calloway, and she gave two additional sheets of handwriting speciments - or wrote two additional sheets -- and they contained her name and address -- for me in my presence at that time.

That was July 25th 1966.

Q Did you make any examination of the questioned document, that is the 202403036 card that Mrs. Calloway denied was her signature?

A Yes, as aginst the group of 24 slips which she denied twenty three of them were signed, and one was unsigned and I compared them with the seven admitted slips and with the handwriting specimen card which she had given, and with the two two additional sheets of handwriting which she had given to me and determined that--

THE COURT: (interposing) I note that the witness is using documents that have not been marked.

MR. PRICE: I am sorry, Your Honor.

THE COURT: Let them be marked for the record.

BY MR. PRICE:

Q Are these the papers that you have just referred to, sir?

A That is correct.

BY MR. DAVID:

Q Strike that entire question and I will start again.

Mrs. Calloway, you heard Mr. Miller, not Mr. Lockwood testify today as a handwriting expert - you heard him state that he had you in his office in the police headquarters back in 1966.

A Yes, I heard him.

Q Prior to today have you ever laid eyes on Mr. Miller?

A No, I have not.

Q Were you ever in Mr. Miller's office?

A If I have ever been in Mr. Miller's office, I don't know whose particular office it was.

Q Did you ever write anything Mrs. Calloway, for Mr. Miller, at any time, anywhere?

A No - I have not.

Q And if you were in Mr. Miller's office was Mr. Miller in that office at that time?

A No, sir.

Q You heard Mr. Miller testify, I believe, that you wrote these specimens for him -- counter defendant's exhibits 2a and 2b -- did you hear that?

A Yes, I did.

Q Can youtell the ladies and gentlemen of the Jury and the Court whether or not you wrote those specimens for Mr. Miller?

A No, I did not.

Q Did you write those specimens for anybody?

A The look like specimens that I wrote for another gentleman but I don't know his name. I definitely know that I never laid eyes on Mr. Miller before.

Mr. Miller --- Your Honor, something has got to be done about this business. This is wrong -- if Mr.Morton would

come to the stand and tell the truth,he was with me all that day until I left Sgt. Magruder's office and Mr.Morton was pledged to tell the truth --

MR. PRICE: Objection, Your Honor.

THE COURT: Just a minute --

THE WITNESS: -- and he hasn't told the truth.

THE COURT: Just a minute, Please.

MR. PRICE: The question called for a yes or no answer and this is not responsive, Your Honor.

THE COURT: Come to the Bench.

(BENCH CONFERENCE)

MR. PRICE: We are objecting that the answer is not at all responsive to the question put to her, Your Honor.

THE COURT: I think she has given her answer to the question and you can now ask her another question Mr. David. I will instruct her to answer the questions she is asked only.

(END OF BENCH CONFERENCE)

THE COURT: Mrs. Calloway --

THE WITNESS: Yes

THE COURT: You are to answer the questions that are asked. Now wait until the next question is asked.

THE WITNESS: Yes, sir.

BY MR. DAVID:

Q The specimens that you did write, Mrs. Calloway,

at police headquarters in 1966, would you tell us what you did with them?

A Yes, I went into the office and I cannot give you the room number, and when I wrote these specimens I gave them to the gentleman who had instructed me to do so. I gave my papers back to him when I finished.

Q Have you seen that gentleman at any time during the course of this trial?

A No, I have not.

Q At no time-- it was not Mr. Miller?

A It definitely was not.

Q And it was not Sergeant - now Lieutenant Magruder?

A No, definitely it was not.

MR. PRICE: I object, Your Honor.

The way the questions are being phrased, they are very leading.

THE COURT: Objection sustained.

MR. DAVID: That I don't understand.

THE COURT: Yourquestions are leading.

MR. DAVID: This is a rebuttal witness.

THE COURT: Proceed.

BY MR. DAVID:

Q Since July - strike that. Since you made the payment of $490 and some cents to Central Charge, has Central Charge ever told you that you owed them any additional

money?

A No - they have not.

Q Have they ever written you a letter demanding any additional amount or the amount of $1,300 and some odd dollars?

A No -- they have not.

MR. DAVID: I have no further questions.

THE COURT: You may cross-examine.

MR. PRICE: No questions, Your Honor.

THE COURT: You may step down.

(Whereupon, the witness was excused.

THE COURT: Is there anything further, Mr. David?

MR. DAVID: Nothing from me.

THE COURT: Does the defendant rest?

MR. DAVID: Yes.

THE COURT: Do you have any rebuttal?

MR. PRICE: No rebuttal, Your Honor.

THE COURT: Ladies and gentlemen of the Jury: You may be excused at this time to return to this Court at ten o'clock in the morning.

P R O C E E DINGS

THE COURT: Mr. David, at the time we recessed yesterday you had asked the Court for permission this morning to make a motion.

You may proceed.

MR. DAVID: The motion I would like to make is one for directed verdict in favor of the counter-defendants based on matters submitted in my prayers -- the case of Andrews versus Haller Wallpaper Company, decided by the Court of Appeals for the District of Columbia, at 32 DC App, 392, and in that case it states the law as it is generally, and also as it is in this jurisdiction.

The case cites with approval many decisions, and I think the most outstanding one would be the decision handed down by Mr. Justice Fuller of the Supreme Court in Chicago, where the Justice stated among other things:

> "Where the aggregate amount is in dispute, the payment of a specified sum conceded to be due -- that is by including certain items but excluding the disputed items, on condition that the same so paid shall be received in full satisfaction," ---

and that that constitutes an extinguishment, of the whole. That is the case of M & St. PR Co. versus Clark, Supra.

Now the evidence in this case showed that there was an honest dispute between the parties here as to the terms of the

contract and the amount due thereunder, and if, therefore, the defendant sends a check for the amount he is willing to pay in compromise, intending it as liquidation of plaintiff's claim against him, and if plaintiff when he accepts the check and cashed the check understood or, from the facts, should have understood the conditions upon which it was sent, there was accord and satisfaction.

THE COURT: Mr. Price?

MR. PRICE: There are a number of points I would like to make in opposition to Mr. David, Your Honor.

I read the case 32 APP D.C. last night and in that case there was a check makred "paid in full" just as in this case. However, there was no question as towhat the amount in dispute was, on the account.

Here of course there are two accounts in question and we could -- since the check was marked "paid in full" and had an account number written across it, we could easily say it was accepted on that particular account.

Secondly, a vital element of accord and satisfaction is the showing of mutual agreement to take less than the original claim but, much more important, is the fact that in all of these cases the defense of accord and satisfaction was pled originally and now Mr. David is asking to plead specifically an affirmative defense of accord and

satisfaction at this point. I am not suggesting that the Jury cannot hear argument as to whether or not the parties agreed to accept less than the original amount, but as a matter of law if Mr. David is asking to raise that defense now, I think it is too late.

THE COURT: It so happens the cases are against you, Mr. Price.

MR. PRICE: Well I was --

THE COURT: Because under Rule 15B where evidence is admitted during the course of a trial in good faith and there was a failure to plead the affirmative defense originally, that does not preclude the affirmative defense from being tried.

MR. PRICE: Well if that is the Court's ruling, but I thought the Supreme Court specifically said that you have to do that.

THE COURT: But the rules have to be read together. You can't take them piecemeal..

MR. PRICE: Yes sir - well then that disposes of that part of my argument, since the Court has ruled on it.

I had two other points though, if we look at it from Mr.David's viewpoint and the cases that he has cited - the parties here knew that they were talking about a certain amount in question and under 32 (a) I believe the check was sent with a covering letter saying "I am paying this and no more

and I trust that you will accept it on the whole account".

That was never done here -- she never admitted owing anything on the other account. She did admit owing on the account with the 536 digits, and the balance of that account was five hundred dollars - she sent $50 and $49.75 which was really the exact amount owing on the account which she admitted.

Of course, on the top of that check we know she put the account number 202403536 and "paid in full", but let us assume that that is correct, that that check paid in full that account -- there is no question about the exact balance outstanding on the account that she admitted.

So, when Central Charge accepted thatcheck that was not accord and satisfaction.

There were two account numbers issued tothis woman and that $490 check exactly paid the balance on account 202403536.

The balance we are now suing on is on the account 202403036 which she steadfastly denied that she ever owed or ever trated against or ever signed for.

So I don'tthink that this is at all the same situation Your Honor --

THE COURT: Well, what is your theory now, Mr. Price? As the Court understood the evidence, you were saying that the account number was the 536 number and that the payments that

were made under account 036 actually belonged under 536 because that was Mrs. Calloway's number.

MR. PRICE: That is correct, Your Honor.

THE COURT: Now you seem to be separating these two accounts in your argument.

MR. PRICE: I don't mean to separate them and Idon't think Central Charge separated them - however, the original plaintiffs and counter-defendants herein - Mrs. Calloway - separated them because the balance--

THE COURT: (Interposing): Well she separated them because she said one of them did not belong to her.

MR. PRICE: That is correct.

THE COURT: That's right -- but I understood you to say that she had only one true number and the purchased made against both account numbers together totalled the proper balance.

MR. PRICE: That is correct. She had one true number which should have been in issue here. There is no question about the fact that there were two charges assuming arguendo that she used them both -- and I suggest that the Court does not sit on that question now -- but the debt incurred by this account number, her original number, 536, the slips totalled, subtracting what she had already paid, $490 and that is the amount she paid.

Now the slips on the 036 account totalled a balance

of $1,300 and no payment, Your Honor, went to that account -- so I don't think there is accord and satisfaction when she puts on the account number, and at thispoint she knew, of course, about the other account number.

THE COURT: But the claim that you made on this lady, Mr. Price, was a claim for $1,924 and you did not segregate that.

MR. PRICE: Oh - you don't mean in the pleadings, do you sir?

THE COURT: I beg your pardon?

MR. PRICE: In the pleadings -- the $1,900?

THE COURT: No - I am talking about the claim that was indispute.

MR. PRICE: That is correct, Your Honor.

THE COURT: Was that $1,924 all of which you said was due under 536?

MR. PRICE: Well 536, except for the chargeplate that was a non-existent number -- there was no other ledger car with that number.

THE COURT: Therefore, there was a disputed claim for $1924 and she claimed that she owed only $490 and you claimed she owned $1924 - is that not a disputed claim? So she paid the amount that she claimed she owed.

MR. PRICE: That is correct. Well we take a different view of the matter -- as I read the cases what they mean by

disputed claim - well, it is not only accord and satisfaction but there isalso the question of non-liquidated accounts.

THE COURT: I believe you will find the cases use the disjunctive term "or" -- "or disputed".

MR. PRICE: Or disputed, will certainly, this would be disputed as Your Honor reads the cases and the testimony. I think there is another question, Your Honor, and that is where there is fraud, because there was a contract between the parties, it is an agreement between the parties, I think from the evidence -- and here, of course, we are asking the court to rule upon the evidence, but there is a question of fraud and I don't think we can get around it.

THE COURT: Let me warn you now - there was no charge of fraud in this case and it was not tried on the question of fraud.

MR. PRICE: Well, no sir - fraud would be a criminal matter.

THE COURT: I would just like to warn you now not to argue the question of fraud before the Jury because these parties were not tried for fraud.

MR. PRICE: No sir - I wouldn't do that - what I am saying Your Honor is to raise a defense of accord and satisfaction it assumes that the parties were in a bargaining position -- that they came to an agreement -- and that this

was a disputed account and they came to an agreement, a contractual agreement, to accept a lesser amount than what was due or claimed due, that it is a compromise fairly arrived at.

However, I think in view of the testimony, if Central Charge had assumed at the time that Mrs. Calloway was telling the truth and took her affidavit so that someone, whoever they caught up with, could possibly be prosecuted, later, for fraud, and they now find out that these were all in her handwriting then that is the kind of fraud that would go to vitiate accord and satisfaction.

THE COURT: Of course the expert testimony is only some evidence -- it does not affirmatively establish beyond recall that this was her handwriting.

MR. PRICE: No it does not but I would say in view of the expert's testimony, Your Honor, plus the testimony of the druggist, as corroboration, I would say at this point although we don't argue this as our main point, that there is little doubt, there is little room for reasonable doubt.

THE COURT: I think the argument you are making now is a proper argument so far as thisbeing a question of fact is concerned and one that should be submitted to the Jury but I do not think that it is one that in any way detracts from the Court's observation.

The question is, what were the circumstanees under which this payment was made and accepted -- that is a question of fact.

I will overrule your motion for directed verdict Mr. David, because in the very case that you mentioned it is indicated that the question as to the circumstances under which the company in this case would have accepted the check would be a fact to be submitted to the Jury, so the motion for directed verdict is danied.

Now we have before us some requests for instructions which were just a few moments ago handed to the Court.

Now let us take counter plaintiff's prayer number one Mr. David -- do you have any objection to that?

MR. DAVID: No objection.

THE COURT: The Court will grant that prayer but it will not be given in exactly the words that are given here -- but it will be given as part of the Court's instruction on credibility which instruction will be in substance Instruction No. 31 of the Standardized Instructions.

Counter plaintiff's instruction No. 2 Mr. David --

MR. DAVID: I do object to that one.

THE COURT: You object?

MR. DAVID: Yes.

THE COURT: The objection will be sustained -- do you

want to argue this one Mr. Price?

To give it as it is worded would be contradictory and would have the effect of taking from the Jury their consideration of other matters involved and the circumstances under which the $490 was paid.

MR. PRICE: Oh I am sorry--- excuse me. Yes, Your Honor,, I had a notation I was reading and this is in error -- if the Court please, I would like an instruction to the effect that they must find for us in whole or not at all - I do not believe that a reasonableJury could do some kind of tabulation because there was no evidence by Mr. David, I don't believe, that some part of the thirteen hundred dollars was paid -- as I understand it at thispoint the defense is either that it was accord and satisfaction or that she did not sign the charge slips -- or else there is no evidence.

THE COURT: That is what I understand to be the defense -- that the $1,387.75, is not her debt, firstly --

MR.PRICE: That is correct.

THE COURT: And, secondly, that where there was a dispute between the parties that dispute was resolved, and the debt extinguished byvirtue of the accord and satisfaction -- am I correctly stating your defenses, Mr. David?

MR. DAVID: That is correct.

MR. PRICE: Right, so in that case Your Honor I would ask for a prayer to the effectthat if they find for

Central Charge they must return a verdict in favor of Central Charge in the amount of $1387, but I do not think it would be proper for the Jury to come back with a verdict for say five hundred dollars for Central Charge, you know.

THE COURT: Well then, in view of what Mr. David has said his defenses are, either they must find for the plaintiff in the amount that is prayed for or that they find for the defendant.

MR. PRICE: That is correct-- I would like such an instruction from the Court -- as to how it is phrased I would leave that to Your Honor.

THE COURT: You would not have any objection then, to that instruction Mr.David?

MR. DAVID: No.

MR. PRICE: Thank you.

THE COURT: Mr. David - have you considered counter-claimant's 3?

MR. DAVID: I would object to that, sir.

THE COURT: On what grounds?

MR. DAVID: I do not think there is enough information in it -- if it were added to one that had the subject matter, but that last paragraph I think--

THE COURT: I will consider counter plaintiff's No. 3 and canter plaintiff's No. 4 together with counter defendant's Nos 1,2 and 3 along with a proposed instruction

that I am in the course of preparing.

MR. DAVID: Your Honor, in the light of what you have just said it appears that everything that I would request be particularized in it--

THE COURT: Well just a minute, Mr. David, you are thinking now of the Andrews case?

MR. DAVID: Yes.

THE COURT: Well I was just going to read this to you. The Court has prepared, or is in the process of preparing, an instruction which will be substantially as follows:

"It is the theory of the counter-defandants in this case that the check of November 1 1966 in the amount of $490.25 was given and received in satisfaction of her entire debt allegedly owed Central Charge. This theory is known as accord and satisfaction. Under the law of the District of Columbia, where a claim is unliquidated or honestly in dispute, the payment and acceptance of a lesser sum that that claimed operates as accord and satisfaction. The person claiming accord and satisfaction must prove the relevance thereof by a preponderance of the evidence.

In this case the counter plaintiffs must prove by a preponderance of the evidence that the amount they allegedly owed was unliquidated or in dispute and, secondly, that

"the check of November 11966 for $490.20 with the notation thereon "final payment in full" was given to Central Charge with the intention that it would relieve the counter defendant from any further payments and that Central Charge from any further payments and that Central Charge accepted such payment as a discharge in full of the counter-defendants from any further payment of the amount allegedly owed Central Charge.

Now, if you find these facts to be established by a preponderance of the evidence, then your verdict would be in favor of the counter-defendants."

Now that is the substance of what each ofyou gentlemen have requested.

MR. DAVID: Yes, sir except that I would further request that in addition -- I am in accord with everything that is in that instruction, but in this case, the Andrews case, the Court there said:

"If..." and there is a great deal of material here which I don't need to read, "or from the facts should have understood" -- and that is not in YourHonor's instruction.

You see, they just can't ignore these facts and say we don't take it that way, because words mean certain things to the average person and they are simple words, and they knew

this matter was in dispute so, since the Court said: "or from the facts should have understood" -- they certainly should have understood here.

THE COURT: Mr. Price, do you want to address yourself to this point?

MR.PRICE: Yes, sir.

THE COURT: This language that Mr. David is pointing to as coming from the Andrews case?

MR. PRICE: Yes.

THE COURT: That if the defendant sent his check for the amount he was willing to pay in compromise intending it as liquidation of the plaintiff's claim against him, and if the plaintiff when he acceted it and cashed the check understood or should, from the facts should have understood, the conditions upon which it was sent - there was accord and satisfaction.

That is the language of the Andrews case.

MR. PRICE: I think if we put in the instruction "or should have understood" we open the door for a lot of conjecture by the Jury, because there is evidence on both sides as to what was said.

THE COURT: Well the proposal is "if he understood or from the facts should have understood"--

MR. PRICE: I have no objection to that, but --

THE COURT: Yes -- I will go over this instruction again.

MR. PRICE: I may be wrong but I think at one point Your Honor said counter plaintiffs, but I think the court meant counter defendants. I'm not sure whether it was written that way or not --

THE COURT: Well I am going to put this langaage in proper sequence --

MR. PRICE: All right.

THE COURT: I haven't had time to consider it fully.

MR. PRICE: Yes, sir.

THE COURT: Allright - now in addition thereto, the Court considers it proper to give an instruction concerning the counter-defendant's position that she never owed any amount in excess of the amount that she paid.

In other words, that she never purchased these items for which the $1385.75 was claimed. To that extent I am in the process again of preparing an instruction, the substance of which would be that if the Jury should find that Mrs. Calloway had an agreement with Central Charge to purchase merchandise on credit at member stores of counter plaintiff, and that she did in fact by reason of such agreement make purchases in the amount as alleged, and that having made such purchases she breached the agreement and failed to timely liquidate the debt, and if they further find that there was no accord and satisfaction, then they would

return a verdict in favor of the counterplaintiff.

If on the other hand they should find that even though an agreement existed and that neither Mrs. Calloway nor anyone authorized by her signed for these charges, that are included there, then they would return a verdict in favor of the counter-defendant. Further, if they find that the agreement existed but that there was accord and satisfaction then, of course, the verdict would be for the defendant.

This is what the Court is now working on because neither of you submitted any prayer with respect to this.

MR. DAVID: Yes, well if the Court please, I may be wrong but I believe at one time furing the trial there was a question of the contract and there were some copies and the court instructed counsel to bring in the original -- I don't know whether he ever exhibited them or put them into evidence but I think that would be in keeping with your last instruction which you propose to give -- I think it would be necessary as to a contract.

THE COURT: I don't follow you. Would you start all over again?

MR. DAVID: At one time during the trial we had photostatic copies and two of them on one sheet, of an alleged contract -- does the Court recall that?

THE COURT: Well I recall that there was an

application on one sheet which I believe covered the situation, Mr. David -- and there was another application on that same sheet --

MR. DAVID: Yes.

THE COURT: That is in evidence.

MR. DAVID: Yes, but I thought, or if I am right the Court, I think, asked the lawyers for Central Charge to bring in all the originals since the witness on the stand admitted that those two were separate applications, but we never got the originals.

THE COURT: I think they were brought in but never put in evidence and the Court didn't order them put into evidence.

MR. DAVID: Were they marked as exhibits, do you recall - you don't recall?

THE COURT: I recall that they were.

MR. DAVID: Oh --

MR. PRICE: Mr. Mahoney brought them in yesterday morning.

THE COURT: Nobody offered them in evidence so we can't deal with it now.

MR. DAVID: I see - it is too late now?

THE COURT: Yes. Is there anyobjection to an instruction along the lines the court has indicated - the last instruction I read?

MR. DAVID: Your Honor - may I defer this for a moment -- I made a motion at the end of my case that all exhibits that had been marked for identification be admitted into evidnce - and that motion was granted. Nobody objected to it at the time.

THE COURT: I never ordered that all exhibits that had been marked be kept in the courtroom - I ordered that the exhibits that were in evidence be left with the Clerk except one which I believe was No. 11 which I authorizdd to be released for the handwriting expert.

MR. DAVID: Yes sir but I think we are talking about two different things -- at the close of my case I moved into evidence all exhibits which had been marked for identification in the course of the trial.

THE COURT: All right - that can be very easily determined.

MR. PRICE: I believe exhibits nine and twelve, thirteen and fourteen - it may very well be that Mr. David is right, but I don't recall.

THE COURT: There were two exhibits --

THE DEPUTY CLERK: According to the record all exhibits have been admitted since 15 and 16, the two checks yesterday.

THE COURT: Yes, that is my recollection. Yes -- plaintiff;s exhibits 1 through 14 were admitted into evidence

and 15 and 16 which consisted oftwo checks were marked, from which testimony was had, but they were never offered.

MR. DAVID: Well then wouldn't have include the cards.

MR. PRICE: Yes.

THE COURT: These cards?

MR. DAVID: They would be in evidence, Your Honor.

THE COURT: No they would not be in evidence unless they were marked.

THE DEPUTY CLERK: Are you talking about the form of application?

MR. DAVID: Yes.

THE DEPUTY CLERK: For Central Charge.

That is nine in evidence and ten in evidence.

MR. DAVID:Nine and ten, admitted?

THE DEPUTY CLERK: Yes.

THE COURT: Yes, nine and ten were admitted.

MR. DAVID: All right then Your Honor, in accordance with this, there is no signature on her, and I think there must be something -- there should be something in the instructions indicating that there is no signature on her to make that a contract on the part of Mrs. Calloway --you see, there is no signature at all on here.

THE COURT: This is in evidence -- it speaks for

itself.

MR. DAVID:Yes, but I think Your Honorwas working on an instruction which should include that.

THE COURT: In addition to the instructions that the Court has mentioned, the Court intends to instruct the Jury on the respective functions of the Court and Jury, that the Jury is to consider the evidence as a whole, that it is to disregard any comments of the Court or questions by the Court - that litigants both natural and corporate stand in an equal position beforethe Court, what consists of the evidence in the case, and as I recall the evidencein this case it consists entirely of the testimony of the witnesses and the exhibits that have been admitted into evidence -- there have been no stipulations or matters of judicial notice by the Court, except two stipulations at the beginning of the trial which are undisputed evidence.

The Court will instruct the Jury with respect to the fact that statements of counsel are not evidence and that the types of evidence which they may consider are direct and circumstantial evidence - and the Court will instruct them on the burden of proof, credibility of witnesses, expert testimony - these are the additional areas in which the Court will instruct the Jury.

Is there anything further at this time, gentlemen?

MR. DAVID: I have nothing further.

THE COURT: Very well -- I will finish working on the instructions.

(Whereupon a 15 minute recess was taken)

THE COURT: Are you ready to proceed?

MR. PRICE: May it please the Court it has been brought to my attention that plaintiff's -- counterplaintiff's exhibits marked 1 and 2a and 2a were not moved into evidence.

THE COURT: They were not.

MR. PRICE: May I move them into evidence at this time?

THE COURT: Mr. David?

MR. DAVID: Objection.

THE COURT: On what grounds?

MR. DAVID: The testimony from the female plaintiff was that this card was not done by her - the testimony regarding 2a and 2b, we would have to goback and consider a great deal of it, but the testimony was that when she went into the room with some people one man Mr. Morton from Central Charge, a person in the police headquarters came and threw a pad and a pencil on the table and that the pencil rolled off the table and that she had to pick it up or picked it up, and she sttated that she was asked to

give samples of her handwriting.

Now these samples are in pen and ink and not in pencil. So certainly these should not be admitted into evidence as what she did, because she used a pencil.

THE COURT: The objection will be overruled and the Court will permit you to reopen for the purpose of admitting these into evidence.

MR. PRICE: Thank you, sir.

THE COURT: Admitted into evidence.

(Whereupon plaintiff's counter- exhibits 1, 2a and 2b were received in evidence)

MR. DAVID: Your Honor, I remember that I asked for certain documents and may these be admitted into evidence at this time?

THE COURT: There were two documents, I believe, 15 and 16 - is there any objection to these?

MR. PRICE: No Your Honor.

THE COURT: They will be admitted into evidence.

(Whereupon plaintiffs exhibits 15 and 16 were received in evidence)

MR. DAVID: Further objection, Your Honor -- this document here, with the sample handwriting--she testified that no one was present and there is a man whose name has been put up here, so there has been a change in this one

and this is not hers--

THE COURT: Could there be a stipulation that what was written up in the corner does not purport to be Mrs. Calloway's handwriting.

MR. PRICE: Well that is in evidence and Mr. Miller testified as to who witnessed her signatures.

THE COURT: I will report to the Jury that there will be a stipulation that as to plaintiff's exhibits 2a and 2b, counterplaintiff's, the writing which appears in red ink in the upper righthand corner does not purport to be in writing belonging to counter-defendants or either of them -- if you can agree to that, gentlemen.

MR. DAVID: So stipulated.

THE COURT: Is there anything further before I call the Jury back?

MR. PRICE: Nothing further.

MR. DAVID: No, Your Honor.

THE COURT: Bring the Jury in, please.

(Whereupon the Members of the Jury resumed their seats in the Jury Box)

AFTERNOON SESSION

2:00 pm

THE COURT: Are you ready to proceed?

MR. DAVID: Yes, Your Honor.

MR. PRICE: Ready, Your Honor.

THE COURT: Very well - bring in the Jury, please.

(Whereupon, the Members of the Jury resumed their seats in the Jury box)

INSTRUCTIONS OF THE COURT TO THE JURY

THE COURT(The Honorable Joseph C. Waddy): Ladies and gentlemen of the Jury, you have heard all the evidence in this case and you have heard the arguments of counsel. It now becomes my duty to instruct you with respect to the Law that applies to this Case.

You will recall that at the outset of this case the case consisted of a complaint made by the plaintiffs, Mr. andMrs. Calloway, against Central Charge Service and Fidelity Adjusters Incorporated, in which Mr. and Mrs.Calloway claimed damages for conspiracy and defamation.

You will recall furtherthat at the end of the plaintiffs case the Court directed a verdict for the defendants against the plaintiffs, the Calloways.

At the same time, the action of the complainants who had been originally Fidelity Adjusters, and who counter-claimed against the Calloways for the amount which they claimed

was owed to Central Charge, Fidelity Adjusters were removed and Central Charge was installed as plaintiff on the counter-claim.

What we have before us now, and what you will decide, is whether or not Central Charge has established its claim against the Calloways, and that is the only case that is before us at this time.

Now the function of the Court is to conduct the trial of a case in an orderly, fair andefficient manner, to rule upon questions of law as they arise in the course of a trial, to instruct you as to the law which applies in the case; it is your duty to accept the law as the Court states it to you.

You should consider all of the Instructions as a whole; you may not disregard any instruction that I will give you or give special attention to any one instruction, or question the wisdom of any rule of law.

You are the Jury in the case and the function of the Jury is to determine the facts. You are the sole and exclusive judges of the facts and you alone determine the weight, the effect and the value of the evidence, and the credibility of the witnesses.

You should determine the facts without prejudice, fear or favor or passion, solely from a fair consideration of the evidence thathas been adduced in this courtroom.

You should consider the evidence in the light of your own observations and experience in the affairs of life.

The actions of the Court during the trial, in ruling on motions or objections of counsel, or in commenting to counsel, or in questions to witnesses, or in setting forth these instructions, are not to be taken by you as any indication of this Court's opinion as to how you should determine the issues of fact.

If the Court during the course ofthis trial, or during the course of these Instructions, has expressed or will express or intimated any opinion as to the facts in this case,you are not bound by that opinion. What the verdict shall be is your sole and exclusive duty and responsibility.

As I have said to you, you are to consider these Instructions as a whole, and if during these instructions any rule or idea stated by me is stated in varying ways, no emphasis thereon is intended by me and none must be inferred by you. For this reason, you are not to single out any single sentence or any individual point of instruction and ignore others, but you are to consider all of the instructions as a whole and regard each in the light of all ofthe others.

In the United States, a judge is permitted to comment to the Jury on the evidence, and such comments are only

expressions of the Judge's opinion as to the facts and you are not bound by that opinion. If, during this Charge or (in the course of this trial, I have made or make any comment on any evidence or any comment which you interpret as an expression or intimation of opinion as to any fact, you are free to disregard it, as you are the sole and exclusive judgesof the issues of fact in the case.

In this case, ladies and gentlemen, you have private individuals on one side and a corporation on the other. With respect thereto you are instructed that you should consider and decide this case as an action between persons of equal standing in the community and of equal worth. A corporation hasthe same right to a fair trial at your hands as a private individual has. The Law is no respecter of persons - all persons, including corporations, stand equally before the Law,and are to be dealt with as equals, in a court of justice.

Now ladies and gentlemen, I have said to you that you are to find the facts based solely upon the evidence which you have seen and heard in this courtroom. The evidence in this case includes the sworn testimony of the witnesses, the exhibits admited into evidence and certain facts to which the Court has called your attention as being stipulated by counsel. At the time, the court explained

to you that a stipulation is an agreed statement of fact between counsel and you may regard such stipulated facts as undisputed evidence.

In considering the evidence in this case you are not limited solely to the statements of the witnesses. You are permitted to draw from the facts which you find have been proved, such reasonable inferences as seem justified in the light of your own experience.

An inference is a deduction or conclusion which reason and common sense lead you to make from facts which have been proved.

During the course of this trial, there have been times when counsel for one side or the other has objected to the introduction of evidence or to the testimony of witnesses. There have been times when a question has been asked and a witness has answered and the Court has stricken that answer.

With respect to this matter, you are instructedthat it is the duty of counsel on each side of the case to object when the other side offers testimony or other evidence which counsel believes is not properly admissable. If during the course of this trial the court sustained an onjection by one counsel to a question asked by the other counsel, you are to disregard the question and you must not speculate as to what

the answer would have been if the Court had permitted the witness to answer.

If, after a question was asked and the answer given, the Court ruled that the answer should be stricken from the record, yuu are to disregard both the question and the answer in your deliberations.

Likewise, any exhibit to which the Court has sustained objection, is not evidence and you must not consider such exbibit in your deliberations.

You are also instructed that the statements of counsel are not evidence and they should not be considered by you as evidence unless such statement was in the nature of a stipulated which I have already explained to you.

Furthermore, if any references by the Court or by Counsel tomatters of evidence do not coincide with your own recollection of the evidence, then it is your recollection which should control during your deliberations.

Ladies and gentlemen, in every trial you hear such phrases as "Burden of proof" and "preponderance of the evidence", and at this time I will explain to you what burden of proof means. It will become more clear as we proceed as to how it is applied in this case.

The party who asserts the affirmative of an issue has the burden of proving it. This burden he must generally carry by a preponderance of the evidence.

This preponderance of evidence does not mean such degree of proof as produces absolute or mathematical certainty - nor does it mean proof beyond a reasonable doubt. Nor is it proof to a moral certainty. That is the type of proof required in a criminal case, and this is not a criminal case - this is a civil case and the burden of proof here is to establish proof by a preponderance of the evidence.

A preponderance of the evidence means such evidence as, when weighed against that which is opposed to it, has the more convincing force. It is a question of quality and not of quantity, which is to say that it is not necessarily determined by the number of witnesses or documents, but to prove a fact by a preponderance of the evidence is to prove that something is more likely so than not so. In other words, a preponderance of the evidence means such evidence as,when considered and compared with that opposed to it, has the more convincing force in your mind, that which is more likely to be true than not true.

A party succeeds in carrying the burden of proof by a preponderance of the evidence, therefore, on an issue of fact if, after consideration of all the evidence in the case, the evidence favoring his side of the issue is more convincing to you and causes you to believe that on that issue the probability of truth favors that party.

If,on the other hand, you believe that the evidence on that issue is evenly balanced then your finding on that issue must be against the party upon whom the burden of proof rested as to that issue.

In determining whether or not a questing has been proved by a preponderance of the evidence, you should consider all of the evidence upon that question, regardless of who produced it. A party is entitled to the same benefit from the evidence that favors him, when produced by his adversary as when it is produced by himself.

I have said that you are to considerthe evidance in this case. There are two types of evidence from which you may find the truth as to the facts of a case and they are known as direct evidence and circumstantial evidence.

Direct evidence is the testimony of one who asserts actual knowledge of a fact, such as the testimony of an eye- witness as to what he saw, and circumstantial evidence is proof of a chain of facts and circumstances from which the existance or non-existance of a fact in issue may be logically inferred. Both types of evidence are equally entitled to your consideration. The Law makes no distinction between the weight to be given to either direct or circumstantial evidence presented to you, nor is a greater degree of certainty required of circumstantial evidence than of

direct evidence. You should weigh all of the evidence in the case and find the facts in accordance with the preponderance of all the evidence, both direct and circumstantial.

I have also heretofore instructed you that you are the judges of the credibility of witnesses and that you determine the credibility of the witnesses and the weight to be given to their testimony.

You must consider and weigh the testimony of all the witnesses who have appeared before you, but you are the sole judges of the credibility of those witnesses. In other words, you alone are to determine whether to believe any witness and the extent to which any witness should be believed.

If there is any confict in the testimony it is your function to resolve that conflict and to determine where the truth lies.

In reaching a conclusion as to the credibility of any witness and in weighing the testimony of any witness, you may consider any matter that may have a bearing on the subject. For intance, you may consider the demeanor of the witness on the witness stand, the witness' manner of testifying, whether the witness impressed you as a truthful individual, whether the witness impressed you as having an accurate memory and recollection, whether the witness impressed you as having

any motive for not telling the truth, whether the witness had a full opportunity to observe the matters about which he or she has testified, whether the witness has any interest in the outcome of the case, or friendship or anomisity toward other persons concerned in the case.

You may consider the reasonableness or the unreasonableness, the probability or the improbability of the testimony of a witness in determining whether to accept it as true and accurate. You may consider whether he has been contradicted or corroborated by other credible evidence in judging his credibility.

You shall have in mind the law that a witness is presumed to speak the truth. This presumption is not conclusive, however, and it may be overcome by contradictory evidance, by the manner in which the witness testifies, by the character of his testimony, or by evidence pertaining to his motives.

Where there is a conflict in the testimony with respect to a material fact you must judge the credibility of the witnesses and you must determine which of the versions should be accepted as true.

If you believe that any witness has shown himself to be biased or prejudiced either for or against either side in this trial, you may consider and determine whether such bias or prejudice has colored the testimony of such witness

so as to affect the desire and capability of that witness to tell the truth and, if you believe that any witness has wilfully testified falsely with respect to any material fact, about which that witness could not reasonably have been mistaken, then you may, if you deem it fit to do so, disregard all or any part of that witness' testimony, or you may accept such portion of his testimony as you may find worthy of belief. You should give the testimony of each witness such weight as in your judgment it is fairly entitled to receive.

Ladies and gentlemen, there has appeared before you in this case and testified, after qualifying, a questioned document expert. You are instructed that a person who, by education, study and experience, has become an expert in any art, science or profession, and who is called as a witness, may give his opinion as to any such matter in which he is specially versed and which is material to the case and that that opinion should be weighed by you like any other evidence in the case. You are not bound by it, however, if the facts upon which it is based have not been established to your satisfaction, by the evidence; on the other hand, you should not reject it if it is uncontradicted and not inherently unreasonable.

Now, ladies and gentlemen, in this case the

Central Charge Service, the counter-plaintiff, is suing the counter-defendants, Mr. Lee J. Calloway and Mrs. Lee J. Calbway, for what the counter-plaintiff claims to be the balance due and owing to it on a debt allegedly incurred by the co nter-defendants through the use of credit cards.

It is undisputed that Central Charge Service is a corporation operating a credit service in the District of Columbia and it is also undisputed that the counter-defendants had a credit card account with Central Charge Service from the early part of 1966 to August of 1966, and that in August of 1966 the account was cancelled.

There is evidence from which you may find that during the period that counter defendants had a credit account with Central Charge, they had a Central Charge credit card no. 202453536 and that during the critical period that that credit card was in the name of Mr. and Mrs. Lee J.Calloway 1449 Ewarts Street, Northeast.

There is also evidence from which you may find that during the period that counter-defendants had the credit card numbered 202453536, purchases were made by the female counter-defendant using the card Ihave just referred to,and that she signed her name, Mrs. Lee J. Calloway therefor.

In addition, there is evidence from which you may find that during the same period another Central Charge credit

card was extant bearing the name Carmella Calloway and the account number of 202403036, and that the address given on that credit card was 1449 Ewarts Street, Northeast,

There is evidence that during that same period purchases were made with the use of this latter charge account.

Counter-plaintiffs calim that the No. 202403036 was issued in error to Mrs.Carmella Calloway, one of the counter-defendants, and that the number on that particular card was placed there in error and should have been the same one -- 202453536. They also claim that the purchases made on 202403036 were made by Mrs. Callowsy and that those charges in July of 1966 constituted part of the counter-defendant's indebtedness to Central Charge under their account No. 202453536 and also claim that this constitutes the indebtedness for which they now sue.

They claim that the counter-defendants have failed and refused to pay the said indebtedness and that there is now due and owing from the counter-defedants to the counter-plaintiffs the sum of $1,383.75.

Now the counter-defendants on the other hand deny that they or either of them ever had a card bearing the number, 202403036 and they deny that the purchases that

were made on that card bearing that number were made by them, or either of them, or anyone acting for them or pursuant to their authority.

They deny that they are or ever were indebted to the counter-plaintiffs in the amount represented by the purchases made under that account no, 202403036 and deny that they are indebted to the counter-plaintiffs in the amount of $1,383.75 or in any amount.

They also claim that this is a dispute between them and the counter-plaintiffs as to the amount that was owed to the counter-plaintiff Central Charge, and they say that they paid the amount of$490.25 on November 1 1966 in final payment, in full, for the amount that they owed, and that counter-claimant"s, Central Charge's, acceptance and cashing of the check bearing that notation under these circumstances, constitutes an extinguishment of the debt.

Now, the burden of proof, as I have said to you, is on the counter-plaintiff to prove by the preponderance of the evidence that the counter-defendants were the holders of credit card 202453536, and I believe there is no dispute with regard to that, but the burden of proof is also on the counter plaintiffs to prove that the credit card bearing the number 202o3036 was issued to Mrs. Calloway and that said number was erroneously placed thereon and that it should have

202453536 and that Mrs. Calloway, or someone acting on her behalf or on behalf of the counter-defendants, made purchases with that erroneous number, 202403036, and signed "Mrs. Lee J. Calloway," on the purchase slips.

They have the burden of proving that the defendants have failed and refused to pay in full the debt owed the counter-plaintiff by the use of said card and that counter-defendants are presently indebted to the counter-plaintiff in the amount of $1,383.75.

The Court has said with respect to the position of the counter-defendants in this case, that one of their defenses is what is known in law as accord and satisfaction -- they have said they have made payment with respect thereto and it is the position of the counter-defendants that the check of November 1, 1966 in the amount of $490.25 which check is in evidence, was given and received by the counter plaintiffs in satisfaction of the entire debt allegedly owed to Central Charge Service.

Now, that is the theory known in the Law as accord and satisfaction.

Under the law of the District of Columbia, where a claim is unliquidated, or honestly in dispute, the payment and acceptance of a sum less than that claimed operates as accord and satisfaction, the compromise being good consideration

for the concessions made.

If the counter-defendant in this case, Mrs. Calloway, sent her check for the amount she was willing to pay in compromise, intending such payment as liquidation of the counter plaintiff's claim against her, and if the counter plaintiff accepted and cashed the check understanding or from facts then available he should have understood the conditions upon which the check was sent, there would be accord and satisfaction.

Now the burden of proof is on the person claiming accord and satisfaction - in this case the counter-defendants, and so the counter defendants in this case must show by a preponderance of the evidence, that the amount allegedly owed Central Charge Service was in dispute and that her check of November 1 1966 for $490.25 with the notation thereon "final payment in full" was given to the Central Charge Service with the intention that it would relieve her from any further payments on the claim, and that Central Charge accepted such payment as a discharge of the counter-defendants from any further payment.

Thus, if you believe from the evidence that the counter defendants have carried their burden by a preponderanceof the evidence, that Mrs. Calloway sent her check dated November 1 1966 to Central Charge for the amount of $490.25 intending such payment to be in full liquidation

of Central Charge's claim against the counter defendants, and that Central Charge accepted and cashed the check and at the time they did so they understood, or should have understood from the facts then existent, the conditions upon which Mrs. Calloway sent it, then there would be an accord and satisfaction.

So, ladies and gentlemen of the Jury, if you find by a preponderance of the evidence in this case that Central Charge's issuance to Mrs. Calloway has been established of a credit card bearing number 202403036 to purchase merchandise on credit at its member stores, and that said card should have borne the number 202453536, and that Mrs. Calloway or someone acting with her authority used said card to make purchases for the amountalleged by the counter-plaintiff, and signed Mrs. Calloway's name as her authority therefor, and that the counter-defendants have failed and refused to pay Central Charge Service the amount due for such purchases, and if you further find that there has not been any valid accord and satisfaction, then your verdict will be in favor of the counter plaintiff, Central Charge Service.

If, on the other hand, you find that Central Charge Service, the counter-plaintiff, never issued a credit card to Mrs. Calloway bearing no. 202403036 then you stop there, and your verdict will be for the counter-defendants.

If you find that the counter-plaintiff issued a credit card to Mrs. Calloway bearing No. 202403036 instead of No. 202453536, but that neither Mrs. Calloway nor anyone acting with her authority made purchases on that card, then your verdict will be in favor of the counter-defendants without regard to any issue as to accord and satisfaction.

If you find that the acceptance of the check of $490:25 dated November 1 1966 with the notation thereon "final payment in full", constituted accord and satisfaction, as I have defined those terms for you, then you will bring in a verdict in favor of the defendants.

Now, ladies and gentlemen, when you go to your Jury room you will choose from among your number a foreman and begin your deliberations. Your verdict in this case must be unanimous - that is to say, all twelve of you who goto the Jury room will have to agree.

If you have occasion to communicate with the Court you may do so through the United States Marshal who will be stationed outside your door. If you do have occasion to communicate with the Court, you will do so in writing but you must on no account let the Court know, nor anyone else know, how you may be divided in your deliberations.

You may have with you in the jury room the exhibits that have been admitted into evidence.

Now the Court will say this to you: The attitude and conduct of jurors at the outset of their deliberations are matters of considerable importance.

It is not discreet for a Juror, upon entering the jury room, to voice an emphatic expression of his opinion about the case or to announce his determination to stand for a certain verdict. When one does that at the outset his sense of pride may cause him to hesitate to recede from an announced position when shown that it is wrong. Remember, you are not partisans or advocates in this case, but you are jurors, that is to say you are the final judges and that the quality of your service will be in the verdict that you return in this case, and notin the opinions which any of you may hold before agreement upon a verdict.

Bear in mind that you make a definite contribution to the efficient judicial administration when you arrive at a just verdict, and to that end the Court reminds you that in your deliberations in the Jury room your purpose should not be to support your own opinion, but to ascertain and declare the truth.

Would counsel approach the Bench?

(Whereupon Counsel approached the Bench)

THE COURT: Are there any objections or additions?

MR. DAVID: First of all I want to compliment the Court on a sterling job but I wanted to ask the Court -- this counter plaintiff and counter defendant confuses me and there has been some confusion throughout and I believe your charge began with the burden of the counter-plaintiff and so on, but you didn't mention the counter plaintiff's name, and also with the counter-defendants -- you didn't mention their names.

I wondered if you want to try and clear that up.

THE COURT: Well I will tell the Jury that wherever I have used the term counter-defendants that refers to Mr. and Mrs. Calloway and whereever I have used the term counter-plaintiff, that that refers to Central Charge.

Is that all - or is there anything else?

MR. DAVID: No.

THE COURT: You are satisfied?

MR. PRICE: Yes - perfect.

(END OF BENCH CONFERENCE)

THE COURT: Ladies and gentlemen, in order that there should be no confusion, wherever I have used the term "counter plaintiff" I am referring to the Central Charge Service as represented by Mr. Price.

Whereever I have used theterm counter-defendant or

counter-defendants, I am referring to Mr. and Mrs. Calloway who are represented by Mr.David.

Ladies and gentlemen, you may now retireto your Jury room, choose your foreman, and begin your deliberations in this case.

NOTE FROM THE JURY

4:40 pm

THE COURT: The Jury has sent to the Court the following note:

"Does the cashing of the check, plaintiffs exhibit No. 3 by Central Charge, marked "fihal payment in full" mean that Central Charge legally considered the debt paid, even though they did not agree that the debt was paid, either verbally or in writing?"

I have had a conference in Chambers with Counsel for both parties and it has been agreed that I will re-instruct the Jury upon this aspect of the case, substantially as I instructed them before, and in addition thereto I will instruct them that in determining the intentions of Mrs. Calloway and the manner in which Central Charge understood, or should have understood, the tendering of this check, that they must take into consideration all of the circumstances in evidence concerning the actions, conduct and words of the parties, as to this aspect of the case.

Is that satisfactory gentlemen?

MR. PRICE: That is satisfactory.

MR. DAVID: Yes, Your Honor.

THE COURT: All right - bring in the Jury.

(Whereupon the Jurors resumed their seats in the jury box)

THE COURT: Members of the Jury, the Court has a note signed by your Foreman, asking as follows:

"Does the cashing of the check, plaintiff's exhibit 3, by Central Charge, marked "final payment in full" mean that Central Charge legally considered the debt paid, even though they did not agree that the debt was paid either verbally or in writing?"

You will recall that the Court instructed you that you are the triers of the fact and that you take your law from the Court.

The Court furhter instructed you with respect to this particular matter that the burden of proof is on the person claiming the accord and satisfaction, and that counter-defendants, the Calloways, in this case must show by a preponderance of the evidence tha the amount allegedly owed Central Charge was in dispute, and that her check of November 1 1966, for $490.25, with the notation thereon; "Final payment in full", was given to Central Charge with the intention that it would relieve her from any further payment of the claim and that Central Charge accepted much payment as a discharge of the counter-defendants, that is the Calloways, from any further payment.

Thus, if you believe from the evidence that the counter defendants - that is, the Calloways -- have carried their burden by a preponderance of the evidence, and that Mrs. Calloway sent her check for $490.25 dated November 1 1966 to Central Charge, intending such payment to be in full liquidation of Central Charge's claim against the counter-defendants, the Calloways, and that Central Charge accepted and cashed the check, and that at the time they did so they understood,or from the facts should have understood, the conditions upon which Mrs.Calloway sent the check, then there would be accord and satisfaction.

I again instruct you, similarly, that if you find that there was an honest dispute between Central Charge and Mrs. Calloway as to the amount that was due, and that Mrs. Calloway sent a check dated November 1, 1966 in the amount of $490.25 with the notation thereon "final payment in full" intending that it would relieve her from any further payments of the claim, and that if youfurther find that Central Charge accepted and cashed the check and at the time it did so it understood or from the circumstances should have understood the conditions upon which Mrs. Calloway sent it, then there would be accord and satisfaction.

I further instruct you that in determining Mrs. Calloways' intention at the time she sent the check

and in determining whether Central Charge understood or should have understood the conditions upon which Mrs.Calloway sent the check, you will take into consideration all of the facts and circumstances in evidence relating to this aspect of the case, including the actions, conduct and words of the respective parties.

You may now return to your jury room and continue your deliberations.

(Whereupon, the Jury retired to deliberate further)

THE COURT: Does Counsel have something they wish to say?

MR. DAVID: No sir.

MR. PRICE: No I don't have anything.

(Whereupon, at 4:50 pm the Hearing was recessed pending the return of a verdict)

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VERDICT OF THE JURY

5:05 pm

THE COURT: The Court is informed that the Jury has announced it is ready.

You may bring in the Jury.

(Whereupon the Jurors took their seats in the Jury box)

THE DEPUTY CLERK: Would the Foreman please rise?

Mr. Foreman, has the Jury agreed upon a verdict?

FOREMAN OFTHE JURY: Yes.

THE DEPUTY CLERK: Do you find for the counter plaintiff, Central Charge, or do you find for Lee J. Calloway and Carmella C. Calloway, thecounter-defendants?

FOREMAN OF THE JURY: For Central Charge.

THE DEPUTY CLERK: In what amount, sir?

FOREMAN OF THE JURY: Thirteen hundred and some dollars.

THE COURT: It appears that the Jury is not in complete agreement. You may return to the Jury room and continue with your deliberations.

MR. DAVID: May we approach the Bench?

THE COURT: Yes.

(BENCH CONFERENCE)

MR. DAVID: It also appears to me that the Foreman doesn't know what his answer is.

THE COURT: Well if the verdict is not clear they will have to go back to the jury room and come back with a complete determination.

MR. DAVID: Well I just wanted to be sure.

THE COURT: We have already told them the amount.

MR. DAVID: Could the court just ask them for a clearer verdict so that we are sure what it is. Not just the amount.

THE COURT: Yes.

MR. DAVID: Thank you.

(END OF BENCH CONFERENCE)

THE COURT: Members of the Jury, you may go back to the Jury room and bring back a complete verdict including the amount.

(Whereupon the Jurors retired to the jury room)

(The Jurors called for the exhibitswhich were taken to the jury room for their consideration)

5:10pm

THE COURT: You may proceed and bring the Jury in.

(Whereupon the Jurors resumed their seats in the Jury Box)

THE DEPUTY CLERK: Would the Foreman please rise?

Mr. Foreman, has the Jury agreed upon a verdict?

FOREMAN OF THE JURY: Yes.

THE DEPUTY CLERK: Do you find for Central Charge Service, the counter-plaintiff, or do you find for Lee J. Calloway and Carmella C. Calloway, the counter-defendants?

FOREMAN OF THE JURY: Central Chargge.

THE DEPUTY CLERK: In what amount, sir?

FOREMAN OFTHE JURY: One thousand, three hundred and eighty seven dollars and seventy five cents.

THE DEPUTY CLERK: Would the remaining Jurors please rise?

Members of the Jury, your Foreman says that you find for Central Charge Service, the counter plaintiff, in the amount of one thousand, three hundred and eighty seven dollars and seventy five cents -- and that is your verdict, so say you all?

(Whereupon the 12 members of the Jury signified affirmatively)

MR. DAVID: Poll the Jury.

THE COURT: A poll has been called for - you may poll the Jury.

(Whereupon, each member of the Jury was polled individually and each Member of the Jury stated

a verdict in favor of the Counter plaintiffs Central Charge Service in the amount of $1,387.75 in accordance with the verdict stated by the Foreman of the Jury).

THE DEPUTY CLERK: The Jury has been polled, Your Honor.

THE COURT: Very well. The Jury has been polled. The Verdict remains the same.

Members of the Jury, that completes your service in this case. The Court wishes to thank you for your services, and you are now to be excused until Monday morning at nine a.m. at which time you will return to the Juror's lounge. You are excused now until Monday at nine am.

(Whereupon the Jurors retired from the courtroom)

MR. DAVID: May I address the Court?

THE COURT: You may.

MR. DAVID: I would aks the Court at this time for judgment NOV in favor of the counter-defendants LeeJ. Calloway and Carmella Calloway on the counterclaim. I do not feel that I need to argue thismotion, but I think it is perfectly fair.

THE COURT: Well as a matter of fact, I thought it was a question of fact that the Jury has now made that determination on all of the evidence.

The motion will be denied.

MR. PRICE: Thank you, Your Honor.

(Whereupon at 5:20 pm the hearing in the above-entitled matter was concluded)

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